Case No. 09-5134

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STATE OF OKLAHOMA, ex rel. OKLAHOMA SECRETARY OF THE ENVIRONMENT J.D. STRONG in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA,

Plaintiff-Appellee,

v.

TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., CAL-MAINE FOODS, INC., CARGILL, INC., CARGILL TURKEY PRODUCTION, LLC, GEORGE'S INC., GEORGE'S FARMS, INC., PETERSON FARMS, INC., SIMMONS FOODS, INC.,

Defendants-Appellees,

and

CHEROKEE NATION,

Intervenor-Appellant.

On appeal from the United States District Court
for the Northern District of Oklahoma
The Honorable Judge Gregory K. Frizzell
Case No. 4:05-CV-00329-GKF-PJC

BRIEF OF PLAINTIFF-APPELLEE STATE OF OKLAHOMA

W.A. Drew Edmondson,
Attorney General
Kelly Foster,
Assistant Attorney General
STATE OF OKLAHOMA
313 N.E. 21st Street
Oklahoma City, OK 73105
(405) 521-3921

Frederick C. Baker
MOTLEY RICE LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29465
(843) 216-9000

(Continued…)

ORAL ARGUMENT REQUESTED

Ingrid L. Moll
MOTLEY RICE LLC
20 Church Street, 17th Floor
Hartford, CT 06103
(860) 882-1678

Louis W. Bullock
Robert M. Blakemore
BULLOCK BULLOCK & BLAKEMORE PLLC
110 West 7th Street, Suite 707
Tulsa, OK 74119
(918) 584-2001

M. David Riggs
Richard T. Garren
Robert A. Nance
David P. Page
Sharon Gentry
RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS
502 West Sixth Street
Tulsa, OK 74119
(918) 587-3161

ATTORNEYS FOR PLAINTIFF-APPELLEE, STATE OF OKLAHOMA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Federal Rules

Other

STATEMENT OF RELATED CASES

Pursuant to Tenth Circuit Rule 28.2, Plaintiff-Appellee identifies Case No. 08-05154 (10th Cir.) as a prior appeal.

STATEMENT OF FACTS

Plaintiff-Appellee, the State of Oklahoma ("the State"), commenced this lawsuit against various poultry integrator Defendants on June 13, 2005, asserting claims under state and federal law (including the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")) for, *inter alia,* damages, cost recovery, injunctive relief and penalties. These claims were asserted to address pollution alleged to have been caused to the waters of the Oklahoma portion of the Illinois River Watershed ("IRW") as a result of the improper disposal of the hundreds of thousands of tons of poultry waste annually generated by Defendants' birds.[1]

Very shortly after the State filed the action, on September 19, 2005, Defendants held a joint defense meeting where the agenda included discussion of the Cherokee Nation as a potential intervenor in the case at bar. (Aplt. App. at 842.) In October 2005, Defendants-Appellees filed numerous motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6) Motions").

[1] With regard to its CERCLA natural resource damage claim to restore the water and biological resources of the IRW, the State asserts that "[t]he Oklahoma Secretary of the Environment, acting on behalf of the State of Oklahoma, is the designated CERCLA trustee for 'natural resources' in, belonging to, managed by, held in trust by, appertaining to or otherwise controlled by the State of Oklahoma . . . ." (Aplt. App. at 324.) For the purposes of CERCLA trusteeship, it is undisputed that the State manages the water and biological resources of the IRW. (*See, e.g.,* Aplt. App. at 884 and 890.)

(Doc. Nos. 64-67, 75.)[2] However, none of Defendants' Rule 12(b)(6) Motions raised any issue pertaining to the Nation. The District Court denied (or denied in part) such Rule 12(b)(6) Motions in June and July 2007. (*See* Doc. Nos. 1186, 1187, 1202, 1206.)

Further, in late 2005, counsel for the Tyson Defendants met with representatives of the Cherokee Nation to discuss their belief that the Cherokee Nation's interests were at issue in this litigation. (Aplt. App. at 647.) However, no motion followed from that meeting.

Yet further, more than 17 months after filing their Rule 12(b)(6) Motions, in March 2007, Defendants filed a motion under Federal Rule of Civil Procedure 12(c) ("Rule 12(c) Motion") challenging the State's standing to pursue its claims. (Doc. No. 1076.) Once again, however, Defendants raised no issue pertaining to the Cherokee Nation. The District Court denied in part this Rule 12(c) Motion on June 15, 2007, permitting the trespass claim (Count 6) to be repled. (Doc. No. 1187; *see also* Doc. No. 1435.)

And further still, on August 15, 2007, Defendants filed a Rule 12(b)(6) Motion to dismiss the repled trespass claim in the Second Amended Complaint (Doc. No. 1235), which was also denied, on January 7, 2008 (Doc. No. 1439). Such Motion did not raise any issue with regard to the Cherokee Nation.

[2] Citations herein to "Doc. No." refer to docket entries in Case No. 05-CV-00329-GKF-PJC (N.D. Okla.).

It was only on October 31, 2008 -- more than *three years* after the case was filed -- and after the State had expended enormous resources in prosecuting its claims against Defendants -- that Defendants filed yet another motion to dismiss, this time pursuant to Rule 19 of the Federal Rules of Civil Procedure ("Rule 19 Motion").[3] (Aplt. App. at 354.) As part of their Rule 19 Motion, Defendants claimed that the State had placed them "in the center of a *two-century-old* conflict over who owns and controls the lands, waters and biota in the IRW," and that the case should be dismissed for failure to join the Cherokee Nation, who Defendants claimed was a required party.[4] (*See* Aplt. App. at 361 (emphasis added).) The Cherokee Nation and the State have both opposed the argument raised in Defendants' Rule 19 Motion that the Cherokee Nation was a required party to the litigation.

Far from harboring any concern that the State's claims might jeopardize its claimed interests in the IRW, the Cherokee Nation believed its claimed interest in addressing the water pollution in the IRW caused by Defendants was adequately represented and protected by the State in this case. (Aplt. App. at 879.) After

[3] Because Defendants' Rule 19 Motion was deemed a multi-part motion, the motion to dismiss component was docketed as Doc. No. 1788, and the motion for judgment as a matter of law component was docketed as Doc. No. 1790.

[4] Defendants filed their Rule 19 Motion against the will of the Cherokee Nation. (Aplt. App. at 873 (the attorney general of the Cherokee Nation stating that, in October 2008, "the defendants, against our will, brought our interest into this lawsuit").)

Defendants filed their Rule 19 Motion, in an effort to moot such Motion and as a cautionary measure to assure the State could proceed with its claims, the State and the Cherokee Nation entered a May 19, 2009 Agreement, which was filed with the District Court.[5] (*See* Doc. No. 2108.) The May 19, 2009 Agreement provides in part:

- "[T]he State of Oklahoma and the Cherokee Nation agree that the lands, water and other natural resources of the Illinois River Watershed should be free of pollution, and accordingly that the claims asserted in [the case at bar] should continue to be prosecuted against Defendants. . . ."
- "[T]he State of Oklahoma and the Cherokee Nation agree that *it is not necessary for the Court to resolve the precise nature of each sovereign's interests in lands, water and other natural resources of the Illinois River Watershed* in order to determine that the State of Oklahoma has sufficient interests to prosecute the action in [the case at bar] and agree that it is in the best interests of both sovereigns to avoid the unnecessary time and expense associated with such an exercise at the present time and in the present forum . . . ."

(*See* Aplt. App. at 532 (emphasis added).)

On June 30, 2009, Defendants filed a motion with the District Court seeking to continue the September 2009 trial date. (Doc. No. 2296.) As part of that motion, Defendants asserted that "[a] short continuance of the trial date would not prejudice any party." (*Id.* at 3 (emphasis added).)

---

[5] The district court found the May 19, 2009 Agreement to be invalid. (Aplt. App. at 553.) The correctness of that determination is not at issue in this appeal.

On July 22, 2009 -- two months before trial -- the District Court concluded that "[t]he Cherokee Nation is a required party under Rule 19 with respect to the State's claims for damages." (Aplt. App. at 568.) The District Court reasoned that "[a]djudication of this action in the Cherokee Nation's absence would impair or impede the Nation's sovereign and stated interest in recovering for itself civil remedies for pollution to lands, waters and other natural resources within its tribal jurisdiction." (Aplt. App. at 559.) The District Court dismissed the State's damages claims in their entirety, including its claims for natural resource damages under CERCLA.[6] (Aplt. App. at 569.) The District Court made this ruling despite its July 2, 2009 acknowledgement that "it's not necessary to determine the respective interests [between the State and the Nation] with regard to a CERCLA claim." (Aplt. App. at 838.)

On August 3, 2009, the State moved for reconsideration of the July 22, 2009 Order with respect to its claims under CERCLA.[7] (Aplt. App. at 570.) Argument

---

[6] In addition to its CERCLA natural resource damages claim, the District Court also dismissed the State's claim for recovery of its CERCLA response costs, as well as its claims for common law damages, punitive damages and unjust enrichment. (Aplt. App. at 569.)

[7] Specifically, the State maintains that it enjoys CERCLA trusteeship in all natural resources within its geographical boundaries, irrespective of ownership and regardless of whether the Nation is a co-trustee. *See* 42 U.S.C. § 9607(f)(1); *United States v. Asarco* ("*Coeur d'Alene II*"), 471 F. Supp. 2d 1063, 1068 (D. Idaho 2005) ("[t]he language of the statute dictates that a co-trustee acting *individually* . . . may go after the responsible party or parties for the full amount of the damage" (emphasis added)). In fact, during the July 2, 2009 hearing, the

was heard on August 14, 2009 (Aplt. App. at 599), and the District Court denied that motion on August 18, 2009 (Doc. No. 2472). Thereafter, the Cherokee Nation sought to participate and did participate in a final settlement conference with the parties before Northern District of Oklahoma Chief Judge Claire Eagan, and final settlement responses to Judge Eagan occurred on August 26, 2009. (Aplt. App. at 873.)

Having "exhausted all of [its] other options to try to protect the resource in this case," the Cherokee Nation moved to intervene exactly one week later, on September 2, 2009 ("Motion to Intervene"). (*Id*.; Aplt. App. at 600.) In light of the District Court's grant of the Rule 19 Motion over its objection and without waiver of its position that the July 22, 2009 Order was incorrect as a matter of law, the State filed a Response in Support of the Cherokee Nation's Motion to

---

District Court acknowledged the *Coeur d'Alene II* holding that it is not necessary to determine the respective property interests of CERCLA co-trustees. (Aplt. App. at 838.) As counsel for the Nation argued, "the question is not who owns the water, the question is who owns the pollution." (Aplt. App. at 878.) Additionally, without regard to the State's claim of ownership or other grounds for trusteeship, it is undisputed in this record that the State of Oklahoma manages the water resources of the Oklahoma portion of the Illinois River Watershed. (Aplt. App. at 884 and 890.) This undisputed management of the waters of the IRW provides a separate and distinct basis for trusteeship under CERCLA. *See* 42 U.S.C. § 9607(f)(1). Moreover, the State maintains that its claim for its own CERCLA response costs cannot possibly raise Rule 19-related issues because the Cherokee Nation has no, and makes no claim to any, interest in recovery of the State's own response costs.

Intervene.[8] (Aplt. App. at 795.)

Prior to the Court's July 22, 2009 Order, the Cherokee Nation did not believe it was a required party to the litigation and believed that its interest in addressing the pollution was adequately protected by the State. (Aplt. App. at 879 ("We did not believe that we were an indispensable party to this lawsuit, Your Honor, because it deals with water quality and not water rights.").) The Cherokee Nation had "always believed that this case was properly about water *quality* and not about water *rights*." (*See* Aplt. App. at 869 (emphases added); *see also* Aplt. App. at 604 ("prior to the [July 22, 2009] ruling it was not clear that the Nation needed to participate in this matter").) The Cherokee Nation's position in this regard is consistent with, among other things, the District Court's earlier statement that "it's not necessary to determine the respective interests [between the State and the Cherokee Nation] with regard to a CERCLA claim." (Aplt. App. at 838.)

During oral argument on the Cherokee Nation's Motion to Intervene, the District Court agreed -- consistent with its July 22, 2009 Order under Rule 19 -- that the Cherokee Nation had the necessary interest for intervention of right under Federal Rule of Civil Procedure 24(a). (*See* Aplt. App. at 880-81.) Indeed, the

[8] The State continues to assert that the District Court's July 22, 2009 Order granting the Rule 19 Motion is erroneous because the Cherokee Nation was never a required party to this litigation. The State reserves all of its rights to appeal any and all aspects of the July 22, 2009 Order when such an appeal is ripe. Nevertheless, because the July 22, 2009 Order is currently the law of the case, the State supports the Cherokee Nation's efforts to intervene in the case at bar.

District Court indicated that it "would have been pleased to grant the Nation's motion to intervene if it had been timely." (*Id*. at 928.) Nonetheless, the District Court denied the Motion to Intervene primarily on timeliness grounds. (*Id.*)[9] Specifically, the District Court found that intervention would cause delay and would require the reinsertion of previously dismissed causes of action (i.e., those dismissed as a result of its July 22, 2009 Order), thereby reviving motions pertaining to those claims. (*Id*. at 927.) The District Court also found that intervention would necessitate "a new round of discovery . . . a new round of motions for summary judgment and likely a new round of motions in limine. . . ."[10] (*Id*.)

For these reasons, the District Court determined that intervention would

---

[9] As additional support for denying the Motion to Intervene, the District Court adopted unspecified "other reasons set forth in the defendants[']brief . . . ." (Aplt. App. at 928.) The United States Supreme Court and this Court have strongly discouraged district courts from basing their opinions on the incorporation of arguments of counsel set forth in briefing. *See United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656 (1964); *Flying J. Inc. v. Comdata Network, Inc.*, 405 F.3d 821, 830 (10th Cir. 2005). Doing so gives rise to a number of serious problems. First, it deprives the appellate court of a clear and well-reasoned record from which to evaluate the quality of judicial decision making at the trial level. Second, it often leads to erroneous decision making because counsel may overstate the strength of the facts or law to favor their client. Finally, when a district court adopts one party's arguments, the "quality of judicial decision making suffers . . . [because] the writing process requires a judge to wrestle with the difficult issues before him and thereby leads to stronger, sounder judicial rulings." *In re Colony Square Co.*, 819 F.2d 272, 275 (11th Cir. 1987).

[10] Explaining the lack of resources to bring this sort of lawsuit, the attorney general of the Cherokee Nation stated to the District Court that it "would be riding on [the State's] coattails." (Aplt. App. at 871.)

"severely prejudice" the existing parties to the case. (*Id*.) The District Court made this ruling *despite* the State's support for the Motion to Intervene and the State's insistence that it would "suffer *no* prejudice if the Nation's Motion to Intervene is granted." (Aplt. App. at 816 (emphasis in original).) The District Court further concluded: "The Nation will not be prejudiced in the sense that its claims will not be impaired by the denial of its motion to intervene. The Cherokee Nation may bring its claims in a separate lawsuit if it wishes."[11] (Aplt. App. at 928.) The District Court so ruled notwithstanding the practical reality expressed by the attorney general of the Cherokee Nation in oral argument that it "do[es] not have the resources to bring this sort of lawsuit . . . on [its] own." (*See* Aplt. App. at 871; *see also id*. at 886 ("it would be prejudicial to [the Cherokee Nation] . . . not to get the benefit of the case that [the State] ha[s] worked up").) In addition, the District Court's decision with respect to "prejudice" did not address arguments regarding the procedural hurdles created by the July 22, 2009 Order granting the Rule 19 Motion. As counsel for the State argued during the September 15, 2009 hearing:

> [A]s it is right now, there is an extremely elegant catch-22 operating. That is neither sovereign can prosecute an environmental case without the other. And so if someone right now were dumping a tanker truckload of toxic waste in the Illinois River and the State of Oklahoma wanted to sue them for it and did not get the Nation to join

[11] Under the District Court's standalone interpretation of CERCLA trusteeship, the State would have to be a party to such a lawsuit "to the extent that this issue of who owns what in the IRW has to be resolved. . . ." (*See* Aplt. App. at 877; *see also* Aplt. App. at 561.)

> us, we couldn't act under, at least under CERCLA, maybe under any of these theories.
>
> The same thing, if they did it in waters that are claimed by the Cherokee Nation as their waters, sacred to their people, they couldn't redress it unless the State of Oklahoma joined. And whether the theoretical aspect of that is right or wrong, we can, as a practical matter deal with it in this court in a very short order and get it right . . . .

(Aplt. App. at 885.)

Following the District Court's denial of the Motion to Intervene, the Cherokee Nation timely initiated the present appeal.

SUMMARY OF THE ARGUMENT

The District Court erred in denying the Cherokee Nation's Motion to Intervene. First, contrary to the District Court's ruling, the Cherokee Nation's Motion to Intervene was indeed timely. The District Court erred as a matter of law by failing to measure the timeliness of the Motion to Intervene from the moment when the Cherokee Nation had reason to believe that its claimed interests could no longer be adequately represented or protected by the State. The Cherokee Nation promptly filed its Motion to Intervene upon learning that -- based upon the current law of the case -- the State could no longer adequately protect its claimed interests.

Second, the District Court erred in finding that intervention of the Cherokee Nation would "severely prejudice the parties." The State has fully supported the Cherokee Nation's Motion to Intervene, argued that it would suffer no prejudice if

it was granted, and has, in fact, been greatly prejudiced by its denial. On the other hand, the "prejudice" asserted by Defendants would have been a function of the intervention itself rather than any delay in filing the Motion to Intervene. Moreover, any "prejudice" claimed by Defendants is due in large part to their own delay in waiting more than three years to file their Rule 19 Motion.

Third, contrary to the District Court's ruling, the Cherokee Nation would be -- and has been -- prejudiced by the denial of the Motion to Intervene. The Cherokee Nation lacks the resources to prosecute its own natural resource damage action against Defendants and faces difficult -- if not impossible -- procedural hurdles created by the District Court's July 22, 2009 Order. Further, the Cherokee Nation will be prejudiced because a complete remedy for the pollution may never be available, and restoration of the IRW will, at a minimum, be unnecessarily delayed for a significant period of time. Under the current law of the case, the Cherokee Nation's interest would, as a practical matter, be impaired or impeded -- and has in fact been impaired or impeded -- by denial of the Motion to Intervene.

For each and all of these reasons, the District Court's denial of the Cherokee Nation's Motion to Intervene was in error and should be reversed, and this matter should be remanded for further proceedings.

ARGUMENT

I. LEGAL STANDARD

Rule 24(a)(2) in relevant part provides: "On timely motion, the court *must* permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may *as a practical matter* impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2) (emphases added). Accordingly, intervention must be permitted upon satisfaction of the following factors:

> (1) the application is 'timely'; (2) 'the applicant claims an interest relating to the property or transaction which is the subject of the action'; (3) the applicant's interest 'may as a practical matter' be 'impaired or impeded'; and (4) 'the applicant's interest is [not] adequately represented by existing parties.'

Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. DOI, 100 F.3d 837, 840 (10th Cir. 1996) (quoting Fed. R. Civ. P. 24(a)(2)). "The Tenth Circuit generally follows a liberal view in allowing intervention under Rule 24(a)." *Elliott Indus. v. BP Am. Prod. Co.*, 407 F.3d 1091, 1103 (10th Cir. 2005); *see also Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1250 (10th Cir. 2001) ("Federal courts should allow intervention where no one would get hurt and greater justice could be attained.").

II. STANDARD OF REVIEW

With respect to the first factor -- the timeliness of the Cherokee Nation's motion -- the standard of review generally is abuse of discretion. *Coalition*, 100 F.3d at 840. Where, as here, a district court applies the wrong *legal* standard, it *necessarily* abuses its discretion. *See Bank One v. Commercial Fin. Servs.*, 43 Fed. App'x 309, 311 (10th Cir. 2002) ("a district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law. . . ." (internal quotation marks omitted)); *cf.* 7C Charles Alan Wright, *et al*., Federal Practice & Procedure § 1916 (3d ed. 2009) ("Since in situations in which intervention is of right the would-be intervenor may be seriously harmed if intervention is denied, courts should be reluctant to dismiss such a request for intervention as untimely. . . .").

The District Court's ruling on the third factor -- whether the Cherokee Nation's interest would be impaired or impeded -- is reviewed *de novo*. *Coalition*, 100 F.3d at 840 (remaining requirements of Rule 24(a)(2) are reviewed *de novo*); *accord WildEarth Guardians v. United States Forest Serv.*, 573 F.3d 992, 995 (10th Cir. 2009).

III. ARGUMENT AND AUTHORITY

In the present case, the District Court denied the Cherokee Nation's Motion to Intervene principally on the ground that the motion was untimely (i.e., the first

factor set forth above). (*See* Aplt. App. at 928.) Certainly, the District Court found that the Cherokee Nation had satisfied the second factor under Rule 24(a)(2)-- namely, an interest in the subject of the action. (Aplt. App. at 556.) With respect to the third factor, however, the District Court concluded that the Cherokee Nation's interest would *not* be impaired or impeded because the Cherokee Nation "may bring its claims in a separate lawsuit if it wishes." (Aplt. App. at 928.) Finally, although the District Court's finding with respect to the third factor implicitly obviated any need to consider the fourth -- namely, whether the State could adequately represent that interest -- the District Court previously had decided that the State could not.[12] (*See* Aplt. App. at 560 ("this court is unpersuaded that the State can adequately protect the absent tribe's interest").) In effect, the District Court substituted its judgment for that of the Cherokee Nation itself, which had unambiguously asserted that the State could represent its interests. (*See, e.g.*, Aplt. App. at 879.)

As set forth below, the District Court erred with respect to the first and third

---

[12] Although the State contests and reserves its right to challenge the District Court's July 22, 2009 determination that the Cherokee Nation is a required party under Rule 19 (Aplt. App. at 547), that order effectively created and conferred a sufficient interest upon the Cherokee Nation under Rule 24(a)(2). *See United Keetoowah Band v. United States*, 480 F.3d 1318, 1324 n.4 (Fed. Cir. 2007) ("an applicant is entitled to intervene in an action when his interest is comparable to that of a person under Rule 19(a)(2)"). Although the State does dispute the nature and extent of the Cherokee Nation's claimed interest in the waters of the IRW, that issue need not be resolved in this appeal.

factors. Specifically, the District Court improperly found that the Cherokee Nation's Motion to Intervene was untimely, and did so largely based upon its erroneous conclusion that the Cherokee Nation's interest would not, as a practical matter, be impaired or impeded by the denial of its Motion to Intervene.

A. The Cherokee Nation's Motion to Intervene Was Timely.

"The trial court must determine timeliness in light of all of the circumstances," including: (1) "the length of time since the applicant knew of his interest in the case"; (2) "prejudice to the existing parties"; (3) "prejudice to the applicant"; and (4) "the existence of any unusual circumstances." *Sanguine, Ltd. v. United States Dep't of Interior*, 736 F.2d 1416, 1418 (10th Cir. 1984); *accord Utah Ass'n of Counties*, 255 F.3d at 1250. The timeliness test is not intended as a means of punishment for a tardy intervenor; rather, it is a "guard against prejudicing the original parties by the failure to apply sooner." 255 F.3d at 1250 (internal quotation marks omitted). The timeliness analysis is "contextual," and absolute measures of timeliness should be ignored. *Id.* In discussing the timeliness of a motion to intervene, this Court has stated that "[f]ederal courts should allow intervention where no one would get hurt and greater justice could be attained." *Id.* (internal quotation marks omitted).

As set forth below, the Cherokee Nation's Motion to Intervene was timely.

1. *Length of Time Interest Known*.

The District Court erred in measuring timeliness based on when the Cherokee Nation believed it had an interest in the subject matter of the litigation, instead of when it had reason to believe that its claimed interest was not being adequately represented by a party. "The date on which the party seeking intervention became aware of the litigation is by itself not always relevant." *Legal Aid Soc'y of Alameda County v. Dunlop*, 618 F.2d 48, 50 (9th Cir. 1980) (citing *NAACP v. New York*, 413 U.S. 345, 366 (1973)). Rather, where -- as here -- the intervenor reasonably believed that its interest in the litigation was being protected by a party (here, the State of Oklahoma), the length of time since the intervenor knew of its interest runs from the point at which "the intervenor became aware that its interest would no longer be protected adequately . . . ." 618 F.2d at 50; *see, e.g.*, *Elliott Indus.*, 407 F.3d at 1103; *see also Sierra Club v. Espy*, 18 F.3d 1202, 1206 (5th Cir. 1994) ("A better gauge of promptness is the speed with which the would-be intervenor acted when it became aware that its interests would no longer be protected by the original parties."); *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 322 (7th Cir. 1995) ("[W]e do not expect a party to petition for intervention in instances in which the potential intervenor has no reason to believe its interests are not being properly represented."); *Hill v. Western Elec. Co.*, 672 F.2d 381, 386 (4th Cir. 1982) ("the critical issue with respect to timeliness is whether the

proposed intervenor moved to intervene as soon as it became clear . . . that the interests of the unnamed class members would no longer be protected" (internal quotation marks omitted). This rule reflects the fact that the right to intervene under Rule 24(a)(2) does not arise unless, *inter alia*, "the applicant's interest is [not] adequately represented by existing parties." *See Coalition*, 100 F.3d at 840 (internal quotation marks omitted); *see also San Juan County v. United States*, 503 F.3d 1163, 1203 (10th Cir. 2007) ("Even if an applicant satisfies the other requirements of Rule 24(a)(2), it is not entitled to intervene if its 'interest is adequately represented by existing parties.'" (quoting Fed. R. Civ. P. 24(a)(2))).

In *Elliott Industries*, for example, this Court permitted litigants in a state court action to intervene in a related federal court appeal because the intervenors' interest -- namely, to challenge the existence of federal subject matter jurisdiction over a certified class of oil and gas royalty owners -- was no longer protected by the appellees. 407 F.3d at 1103. Specifically, because the trial court ultimately ruled in appellees' favor on the merits, the appellees no longer had reason to contest subject matter jurisdiction on appeal. *Id*. at 1104 n.5. With respect to the timeliness of the intervenor's motion, the Court was therefore persuaded that, "[p]rior to the district court's entry of final judgment it was reasonable for [the intervenors] to rely on [the appellees] to argue the issue of subject matter jurisdiction." *Id.* at 1103. Thus, this Court applies a reasonableness standard.

Likewise, the United States Supreme Court found a motion to intervene to be timely in a class action where "as soon as it became clear to the respondent that the interests of the unnamed class members would no longer be protected by the named class representatives, she promptly moved to protect those interests." *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394 (1977).

In the present case, the District Court erred as a matter of law by declining to apply this legal standard. That is, the District Court failed to measure the timeliness of the Motion to Intervene from the moment when the Cherokee Nation had reason to believe that its interests could no longer be adequately represented or protected by the State. Instead, the District Court erroneously ruled that "[t]he defendants ha[d] adequately demonstrated that the Cherokee Nation *knew of its interest* in this case *from the outset of the litigation*, but chose not to intervene for a number of reasons *and the Court will not second-guess those reasons*." (Aplt. App. at 927-28 (emphasis added).)

This Court has held that "representation is adequate when the objective of the applicant for intervention is identical to that of one of the parties." *San Juan County*, 503 F.3d at 1204 (internal quotation marks omitted). And the record evidence indicates that the Cherokee Nation plainly believed that its interests in protecting water quality in the IRW were being properly represented by the State until the District Court said otherwise in its unprecedented July 22, 2009 Order.

(*See* Aplt. App. at 560.) Indeed, the Cherokee Nation expressly articulated this view, including during oral argument on its Motion to Intervene:

> THE COURT: I take it that you continue to take the position that your interest is adequately protected by the State.
>
> MS. HAMMONS [attorney general of the Cherokee Nation]: We believed up until July 22nd, Your Honor, that our interest in addressing the pollution was adequately protected by the State.

(Aplt. App. at 879.)

Moreover, until such time as the District Court departed from established law in the area of CERCLA co-trusteeship, it was eminently reasonable for the Cherokee Nation to believe its interests in protecting the water quality of the IRW were adequately represented by the State. The District Court itself initially signaled that such reliance was reasonable. During the July 2, 2009 hearing on Defendants' Rule 19 Motion, the District Court stated that "it's not necessary to determine the respective interests with regard to a CERCLA claim. And, in fact, *Coeur d'Alene* [*II*] says that." (Aplt. App. at 838.) Specifically, that decision -- *United States v. Asarco (Coeur d'Alene II)* -- expressly held that a CERCLA co-trustee may properly prosecute a CERCLA natural resource damage ("NRD") claim in the *absence* of the other co-trustee, consistent with CERCLA's language, purpose, and practice:

> The language of the statute dictates that a co-trustee *acting individually* or collectively with the other co-trustees may go after the responsible party or parties *for the full amount of the damage*, less any

> amount that has already been paid as a result of a settlement to another trustee by a responsible party. *If there is a later disagreement between the co-trustees, that disagreement would have to be resolved by successive litigation between the trustees, but it could in no way affect the liability of the responsible party or parties*.

471 F. Supp. 2d at 1068 (emphases added).

Indeed, the plain language of CERCLA makes it clear that *ownership* of a natural resource is *not* a prerequisite for CERCLA trusteeship. Section 107(f)(1) of CERCLA, which governs the existence of a state's trusteeship interest in natural resources, provides that in addition to ownership forming a basis for a CERCLA trusteeship interest, a State's CERCLA trusteeship interest also exists as to natural resources "within the State" *or* "belonging to" *or* "managed by" *or* "controlled by" *or* "appertaining to" the State. 42 U.S.C. § 9607(f)(1). Without regard to the State's claim of ownership, the waters of the IRW (and biota therein) at issue in this case are managed and controlled by the State, appertaining to the State, and "within the State." Likewise, there is no dispute that the waters of the IRW and biota therein are comprehensively "managed by" the State. (*See, e.g.*, Aplt. App. at 884 and 890.)

Moreover, the Cherokee Nation "always believed that this case was properly about water *quality* and not about water *rights*." (*See* Aplt. App. at 869 (emphasis added).) In this regard, *United Keetoowah Band of Cherokee Indians v. United States*, 480 F.3d at 1326-27, is instructive. In *United Keetoowah*, the Keetoowah

Band of Cherokee Indians ("UKB") brought an action against the United States seeking compensation for the extinguishment of all right, title and interest to Arkansas Riverbed Lands as permitted under the Cherokee, Choctaw and Chickasaw Nations Claims Settlement Act, as well as damages for breaches of the federal government's fiduciary duties with respect to these Riverbed Lands. The Cherokee Nation moved to intervene to seek dismissal of the UKB's claims under Rule 19, arguing in part that it is the sole titleholder of all Riverbed Lands identified in the Settlement Act, and therefore a required party. Reversing the district court's granting of the motion, the Federal Circuit explained:

> [T]he proper analysis to determine whether an absent party has an 'interest' under Rule 19(a)(2) sufficient to permit intervention in a pending action must begin by correctly characterizing the pending action between those already parties to the action.

Id. at 1326. The Federal Circuit found that the subject matter of the action was extinguishment of the UKB's claims, and not (as the district court had found) an action to establish title to the Riverbed Lands. The Court further held:

> As we find that the 'subject' of the UKB's action is limited to claims permitted under the Settlement Act, we consequently find that the [CN] does not have 'an interest relating to' the UKB's statutory claims. . . . The [CN] will not 'gain or lose' title to lands that it alleges ownership over if the trial court awards the UKB monetary damages under the Settlement Act.

Id. at 1326-27.

Such is the case here. The State's action is not an action to determine

ownership of or sovereignty over certain natural resources of the IRW. Rather, it is an action by the State against Defendants to remedy pollution of certain natural resources in the IRW. Because the Cherokee Nation always believed that this case was about water quality, and not water rights, it reasonably believed that it was not a required party for the pursuit of the State's damage claims.

For these reasons, the Cherokee Nation (and the State) had a reasonable basis to be confident that the Court would deny Defendants' Rule 19 Motion, determine that the Cherokee Nation was not a required party, and permit the State to continue pursuing its damage and cost recovery claims in the Cherokee Nation's absence. Neither the State nor the Cherokee Nation had reason to believe that the District Court would rule contrary to its earlier expressed understanding of the working of CERCLA trusteeship, and contrary to the express language of CERCLA itself, in dismissing the State's CERCLA claims, among others. However, on July 22, 2009, the District Court did so and granted in part Defendants' Rule 19 Motion, dismissing all of the State's damage and cost recovery claims based on its conclusion that the Cherokee Nation was a required party. (Aplt. App. at 568-69.)

The timeliness of the Motion to Intervene is further underscored by the fact that the District Court's July 22, 2009 ruling with respect to CERCLA trusteeship was based on a lone decision that had been abandoned by the very court that issued

it. Specifically, as grounds for its July 22, 2009 Order, and contrary to its statements at the July 2, 2009 hearing and the *Coeur d'Alene II* decision, the District Court erroneously relied on the abandoned analysis of *Coeur d'Alene Tribe v. Asarco Inc. (Coeur d'Alene I)*, 280 F. Supp. 2d 1094 (D. Idaho 2003), which was modified -- and effectively reversed -- by *Coeur d'Alene II*, 471 F. Supp. 2d at 1067-69. In determining that there would have to be an allocation between the Cherokee Nation's and the State's respective interests, "thereby impairing the Cherokee Nation's ability to protect its interests" (Aplt. App. at 561), the District Court became the only court other than the court in the abandoned *Coeur d'Alene I* decision to have ruled in such a manner. Again, until July 22, 2009, the Cherokee Nation had no reason to believe that the District Court would rely on an effectively reversed decision in holding that it was a required party to the State's CERCLA claims.

On August 18, 2009, during proceedings on the State's Motion for Reconsideration of the July 22, 2009 Order, the District Court made it clear that it would not modify the July 22 Order. (Aplt. App. at 840-41.) The Cherokee Nation constructively intervened immediately, making every effort to facilitate a resolution of the dispute, including participating in a settlement conference with all parties before Chief Judge Claire Eagan of the Northern District of Oklahoma. (Aplt. App. at 873.) Final settlement responses were due to Judge Eagan on

August 26, 2009. (*Id.*) On September 2, 2009 -- just six weeks after the District Court's July 22 Order, only two weeks after the District Court denied the State's Motion to Reconsider, and a mere one week after settlement talks broke down -- the Cherokee Nation filed its Motion to Intervene. (Aplt. App. at 600.) Given the totality of the circumstances, the Cherokee Nation acted promptly to intervene in this case upon learning of the District Court's unprecedented opinion that the State could not prosecute its (the State's) damage and cost recovery claims in the Cherokee Nation's absence.

2. *Prejudice to Existing Parties.*

"The prejudice prong of the timeliness inquiry measures prejudice caused by the intervenors delay -- *not by the intervention itself.*" *Utah Ass'n of Counties*, 255 F.3d at 1251 (internal quotation marks omitted); *see also Stallworth v. Monsanto Co.*, 558 F.2d 257, 267 (5th Cir. 1977) ("the relevant issue is not how much prejudice would result from allowing intervention, but rather how much prejudice would result from the would-be intervenor's failure to request intervention as soon as he knew or should have known of his interest in the case").

As previously demonstrated, prior to the District Court's July 22, 2009 Order, the Cherokee Nation reasonably believed that the State could protect its interests in water quality in the waters in the Oklahoma portion of the IRW. Thus, the question with respect to prejudice is whether and to what extent the State and

Defendants were harmed by the passing of six weeks' time between the District Court's surprising conclusion that the Cherokee Nation was a required party, on July 22, 2009, and the Cherokee Nation's Motion to Intervene, on September 2, 2009.

With regard to prejudice, the District Court found the following:

> The filing of an intervenor's complaint, including a federal common law nuisance claim would trigger more than a 120 day delay. It would require the reinsertion of three causes of action that were previously dismissed, the consequent resuscitation of numerous motions pertaining to those causes of action, both motions for summary judgment and motions in limine. . . . [I]t would trigger the necessity of a new round of discovery pertaining to at least the statute of limitations issues, a new round of motions for summary judgment and likely a new round of motions in limine, in addition to those 41 that have already been filed.
>
> Such an approach would result in delay and expense, which would severely prejudice the parties who have been actively proceeding toward trial these past four-plus years.

(Aplt. App. at 927.)

First, and fundamentally, the timeliness test requires consideration of "prejudice to the existing parties." *Sanguine,* 736 F.2d at 1419. Obviously, the State is one of the existing parties in this case. Yet, the District Court completely disregarded the State's *support* for the Motion to Intervene and the State's insistence that it would "suffer ***no*** prejudice if the Nation's Motion to Intervene is granted." (Aplt. App. at 816 (emphasis in original).) In fact, the State argued that it would be "greatly prejudiced" were the District Court to deny the Motion to

Intervene. As the State predicted, and contrary to the District Court's finding that intervention of the Cherokee Nation would "severely prejudice the parties" (*id.*), the State has been severely prejudiced by the Court's denial of the Motion to Intervene. As a result of the District Court's decision, the State was denied the present opportunity to pursue (in a single trial) a full remedy for the water pollution at issue, including the opportunity to prosecute its substantial damage claims against Defendants, to recover its response costs under CERCLA, and to hold Defendants fully accountable for the injuries they have caused and continue to cause to the waters of the IRW. The District Court's failure to consider the prejudice to the State constitutes reversible error.

Additionally, none of the factors cited by the District Court in support of its "prejudice" finding -- save the exact length of any continuance[13] -- would have been any different in the event that the Cherokee Nation had requested intervention immediately, on July 22, 2009. Thus, the "prejudice" described by the District Court would have been a consequence, *not* of the Cherokee Nation's timing, but rather the fact of intervention.[14] *See Utah Ass'n of Counties*, 255 F.3d at 1251

---

[13] Presumably, the District Court arrived at 120 days based upon the State's September 3, 2009 Motion for Continuance of Trial, in which the State sought a 120-day continuance of the trial date to permit any necessary discovery with respect to the Cherokee Nation. (*See* Doc. No. 2573 at 3.)

[14] As a practical matter, allowing the Cherokee Nation to intervene would have placed the State and Defendants in approximately the same position

("Plaintiffs also assert that they would be prejudiced by allowing intervention because adding additional parties would double the work load and add issues. These factors, however, are a function of intervention itself rather than the timing of the motion to intervene."). For instance, any new discovery that Defendants would wish to conduct or dispositive motions that Defendants would want to file with respect to the Cherokee Nation would be a function of the intervention itself, not the timing of filing the Motion to Intervene.

Also, while the District Court seemingly ignored the State's claim of prejudice, the District Court gave full credit to Defendants' claims of prejudice. However, Defendants' claims of prejudice lack objective credibility. Defendants were permitted to use their purported fear of multiple litigation as a sword in the context of their Rule 19 Motion, and then use multiple litigation as a shield in the context of their opposition to the Cherokee Nation's Motion to Intervene under Rule 24(a)(2). (*Compare* Aplt. App. at 378-79 (Defendants claiming in Rule 19 Motion that "joinder of the Nation is necessary under Rule 19 because any resolution of this lawsuit in the Nation's absence would subject Defendants to 'a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reasons of the claimed interest'"), *with* Aplt. App. at 664 (Defendants claiming in Rule 24 opposition that "the Cherokee Nation can bring those claims in its own

---

that they found themselves on July 21, 2009 -- i.e., facing claims and evidence that they had wrestled with and developed over the course of more than four years.

lawsuit").)

Further, while Defendants claimed that they would be prejudiced by any delay of the trial date necessitated by the Cherokee Nation's intervention, on June 30, 2009, *Defendants themselves filed a motion with the Court seeking to continue the trial date*. (Doc. No. 2296.) Thus, a mere two months before the Cherokee Nation moved to intervene, Defendants asserted that "[*a*] *short continuance of the trial date would not prejudice any party*." (*Id.* at 3 (emphasis added).)

Moreover, any claimed prejudice to Defendants is due in large part to their unreasonable delay in filing their Rule 19 Motion. (*See* Aplt. App. at 354.) Specifically, the record shows that Defendants discussed among themselves the Cherokee Nation as being a "Potential Intervenor[]" as early as September 2005. (Aplt. App. at 842.) They claim, "[i]n late 2005, counsel for the Tyson Defendants . . . met with Chief Smith and representatives of the Cherokee Nation to discuss the fact that the State's complaint directly implicated the Cherokee Nation's asserted interests in lands, waters, and biota within the Oklahoma portion of the IRW." (Aplt. App. at 647.) Contrary to the reasonable beliefs of the State and the Cherokee Nation, Defendants clearly believed that the Cherokee Nation was a required party from the outset of this litigation. Yet, Defendants waited for over three years and after the expenditure of tremendous resources in the litigation to file the Rule 19 Motion and raise -- for the first time -- the issue of the Cherokee

Nation's interests. Had Defendants filed the Rule 19 Motion earlier, the issue of the Cherokee Nation's interest would not have disrupted the proceedings so close to trial. But, rather than consider intervention *in light* of Defendants' delay, *see Utah Ass'n of Counties*, 255 F.3d at 1250 ("timeliness of a motion to intervene is assessed in light of all the circumstances" (internal quotation marks omitted)), the District Court counted it *against* the Cherokee Nation.

Finally, the Cherokee Nation's intervention would not have presented Defendants with any *new* claims for damages or injunctive relief, but merely would have reinstated damage claims that had always been in the lawsuit. (*See, e.g.*, Aplt. App. at 905 (MS. HAMMONS: "Your Honor, we brought nothing new to this case, we're seeking nothing new that wasn't there as of July 21st, 2009.").) Defendants had long prepared to defend against such claims that were dismissed solely because of the District Court's Rule 19 decision. Thus, Defendants would face no prejudice in having to defend against the original claims.

3. *Prejudice to the Cherokee Nation.*

As previously discussed, "prejudice to the applicant" is one of several sub-factors that courts must consider in assessing the timeliness of a motion to intervene, *see Sanguine*, 736 F.2d at 1418, and timeliness is itself one of four factors that courts must evaluate in the course of deciding whether to grant such a motion, *see Coalition*, 100 F.3d at 840. Courts must also consider whether "the

applicant's interest may as a practical matter be impaired or impeded." 100 F.3d at 840 (internal quotation marks omitted).

In the present case, the District Court's finding that the Cherokee Nation "will not be prejudiced" rested squarely on its conclusion that "[the Cherokee Nation's] claims will not be impaired by the denial of its motion to intervene." (Aplt. App. at 928.) Because, as set forth *infra*, in part III.B, the Cherokee Nation's interest, as a practical matter, would be -- and, indeed, has been -- impaired and impeded by the District Court's denial of its Motion to Intervene, the finding that the Cherokee Nation "will not be prejudiced" was also in error.

4. *Unusual Circumstances*.

As a whole, this case is certainly "unusual" by any measure. In particular, there are unusual circumstances that support the Cherokee Nation's intervention. Under the District Court's ruling with respect to CERCLA trusteeship, contrary to 42 U.S.C. § 9607(f)(1) and *Coeur d'Alene II*, neither the Cherokee Nation nor the State may pursue any natural resources damages claim individually relating to the natural resources at issue as to this watershed and these Defendants. Rather than mitigate the harsh result of this unprecedented ruling by permitting the Cherokee Nation to intervene so that the Cherokee Nation and the State could proceed as co-trustees, the District Court compounded the problem by depriving both the State and the Cherokee Nation of the opportunity to pursue a full recovery in an efficient

manner, to avoid costly piecemeal litigation, and to bring restoration to the polluted waters of the IRW.[15]

Although the State has proceeded to trial on its remaining non-damage claims (which trial is in its fourth month as of this filing), the District Court's denial of the Cherokee Nation's Motion to Intervene, coupled with its July 22 Order, works such that only as co-plaintiffs could the State *and* the Cherokee Nation bring a damages claim -- and/or CERCLA cost recovery claim -- against Defendants in a subsequent and separate action. Because neither sovereign can be joined against its will, both would again need concurrently to waive their sovereignty. Such coordination of priorities is often difficult, potentially providing Defendants with an unwarranted and unjust escape from liability for damages and/or response costs. Moreover, such litigation would in large part duplicate the significant effort already undertaken by and currently being shouldered by the State. Thus, the denial of the Cherokee Nation's Motion to Intervene has the potential to result in a massive, unnecessary and preventable expenditure of public

[15] As the attorney general of the Cherokee Nation argued during the September 15, 2009 hearing: "If we are not allowed to intervene in this lawsuit, we will have to, at some point, file a new lawsuit. We will have to try to join the State of Oklahoma who also has immunity. Whether or not politically they can do it at that time is an issue. Whether or not we can afford to do it is a very real issue. It makes all sorts of sense and is a reasonable, practical approach to allow us to intervene in this lawsuit with all of the discovery that's gone on, with all of the experts that have been deposed, with all of the fact-finding that's been done and bring this case back to where it was, or at least partially to where it was on July 21st, 2009." (Aplt. App. at 875.)

resources by the State, the Cherokee Nation, and the courts.

Finally, the District Court improperly overlooked the Cherokee Nation's effort to have its claims against Defendants decided in this action, including the Cherokee Nation's effort to broker a resolution prior to moving to intervene. (*See, e.g.*, Aplt. App. at 873 ("THE COURT: You attempted to get everybody to sit down and work this thing out, apparently. MS. HAMMONS [attorney general of the Cherokee Nation]: We very much did.").)

In sum, the District Court abused its discretion in failing to give appropriate weight to these unusual circumstances.

B. Under the Current Law of the Case, the Cherokee Nation's Interest Would Be Impaired or Impeded.

Rule 24(a)(2) requires the court to permit the timely intervention of anyone who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may *as a practical matter* impair or impede the movant's ability to protect its interest. . . ." Fed. R. Civ. P. 24(a)(2). It generally is agreed that "the question must be put *in practical terms rather than in legal terms*." 7C Charles Alan Wright, *et al*., Federal Practice & Procedure § 1908.2 (3d ed. 2009) (emphasis added).

In practical terms, as the Cherokee Nation stated in its Motion to Intervene:

> Now that [the District Court] has found that the Nation is an indispensible party for the CERCLA and damages claims asserted by the State *there is little chance that funding will be available to provide*

> *the restoration that the IRW needs*. Without the Nation as a party and the claims that it can bring, an important resource will continue to diminish in quality and economic value.

(Aplt. App. at 605 (emphasis added).) Without the opportunity to join with the State in this action, and with the District Court's July 22, 2009 Order as the current law of the case, the Cherokee Nation faces the prospect of raising substantially the same claims against Defendants in separate, costly, and time-consuming litigation. Upon denial of the Cherokee Nation's Motion to Intervene, the opportunity for an efficient and complete resolution of all of the issues and for all of the interested parties in a single trial under the District Court's July 22 Order was lost. As a practical matter, the Cherokee Nation and the State now face significant delay and added expense with respect to their damages and cost recovery claims, notwithstanding the inordinate commitment of resources with respect to those claims by the State, Defendants, and the District Court prior to July 22, 2009.

Simply stated, the District Court ignored these *practical* consequences. Rather, the District Court found that the Cherokee Nation's interest would not be impaired or impeded -- and, thus, that the Cherokee Nation was not prejudiced -- because of the Cherokee Nation's *theoretical* right to bring its own lawsuit. (*See* Aplt. App. at 928 ("The Cherokee Nation may bring its claims in a separate lawsuit if it wishes.").) Given the enormity of this litigation -- in terms of time, expense, parties, and issues -- it is beyond dispute that the Cherokee Nation was prejudiced

by the denial of its Motion to Intervene.

For these reasons, the District Court erred in failing to conclude that the Cherokee Nation's interest in the IRW "'may as a practical matter' be 'impaired or impeded.'" *Coalition*, 100 F.3d at 840 (quoting Fed. R. Civ. P. 24(a)(2)).

CONCLUSION

For the foregoing reasons and those stated in the Appellant's Brief, the District Court's denial of the Cherokee Nation's Motion to Intervene should be reversed, and the case remanded for further proceedings.

REQUEST FOR ORAL ARGUMENT

Pursuant to 10th Cir. R. 28.2(C)(4), the State respectfully requests that oral argument be heard on this matter due to the unusual procedural posture of the appeal and implications on significant matters of public interest at issue in this case.

Respectfully submitted this 28th day of December, 2009.

PLAINTIFF-APPELLEE,
STATE OF OKLAHOMA

W.A. Drew Edmondson
ATTORNEY GENERAL
Kelly H. Foster
ASSISTANT ATTORNEY GENERAL
State of Oklahoma
313 N.E. 21st St.
Oklahoma City, OK 73105
(405) 521-3921

/s/ Ingrid L. Moll
Ingrid L. Moll
MOTLEY RICE LLC
20 Church Street, 17th Floor
Hartford, CT 06103
(860) 882-1678

M. David Riggs
Richard T. Garren
Robert A. Nance
David P. Page
D. Sharon Gentry
RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS
502 West Sixth Street
Tulsa, OK 74119
(918) 587-3161

Louis W. Bullock
Robert M. Blakemore
BULLOCK, BULLOCK & BLAKEMORE
110 West Seventh Street, Suite 707
Tulsa, OK 74119
(918) 584-2001

Frederick C. Baker
MOTLEY RICE LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29465
(843) 216-9280

CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPE FACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b) because this brief contains 8,918 words, excluding the parts of Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionately spaced typeface using a 14-point Times New Roman font.

/s/ Ingrid L. Moll
Ingrid L. Moll
MOTLEY RICE LLC
One Corporate Center
20 Church Street, 17th Floor
Hartford, CT 06103
(860) 882-1678
imoll@motleyrice.com

Dated: December 28, 2009

CERTIFICATION OF DIGITAL SUBMISSIONS

I hereby certify that:

1. All required privacy redactions have been made;

2. The ECF submission is an exact copy of the hard copy submissions; and

3. The digital submissions have been scanned for viruses with version 8.0 Service Pack 1 of TREND MICRO™ OfficeScan™, updated December 23, 2009 (Spyware Pattern) and December 28, 2009 (Virus Pattern), and, according to the program, are free of viruses.

/s/ Ingrid L. Moll
Ingrid L. Moll
MOTLEY RICE LLC
One Corporate Center
20 Church Street, 17th Floor
Hartford, CT 06103
(860) 882-1678
imoll@motleyrice.com

Dated: December 28, 2009

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of December, 2009, I electronically filed the foregoing Brief of Plaintiff-Appellee with the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electric Filing to the following ECF registrants:

Baker, Frederick C.: fbaker@motleyrice.com
Bartley, Sherry P.: sbartley@mwsgw.com
Bassett, Woody: wbassett@bassettlawfirm.com
Blakemore, Robert M.: bblakemore@bullock-blakemore.com, nhodge@bullock-blakemore.com, bdejong@bullock-blakemore.com
Bond, Michael Richard: michael.bond@kutakrock.com, sue.arens@kutakrock.com, erin.thompson@kutakrock.com, Dustin.darst@kutakrock.com
Bronson, Vicki D.: vbronson@cwlaw.com, vmorgan@cwlaw.com, lphillips@cwlaw.com
Bullock, Louis W.: lbullock@bullock-blakemore.com, nhodge@bullock-blakemore.com, bdejong@bullock-blakemore.com
Burns, L. Bryan: bryan.burns@tyson.com
Ehrich, Delmar R.: dehrich@faegre.com, qsperrazza@faegre.com
Elrod, John Russell: jelrod@cwlaw.com, vmorgan@cwlaw.com
Fitzpatrick, Fidelma L.: ffitzpatrick@motleyrice.com
Foster, Kelly Hunter: kelly.foster@oag.ok.gov
Freeman, Bruce W.: bfreeman@cwlaw.com
Funk, D. Richard: rfunk@cwlaw.com
Garren, Richard T.: rgarren@riggsabney.com
Gentry, Dorothy Sharon: sgentry@riggsabney.com
George, Robert W: robert.george@tyson.com
Graves, James M.: jgraves@bassettlawfirm.com
Green, Thomas C.: tcgreen@sidley.com
Hammons, A. Diane, Attorney General: diane-hammons@cherokee.org, ccarroll@cherokee.org, sara-hill@cherokee.org, sonja-glory@cherokee.org
Hill, Theresa Noble: thillcourts@rhodesokla.com
Hixon, Philip D.: phixon@mhla-law.com
Hopson, Mark D.: mhopson@sidley.com
Jantzen, Stephen Lee: sjantzen@ryanwhaley.com, dmaple@ryanwhaley.com, mkeplinger@ryanwhaley.com
Jasinski, Mathew P.: mjasinski@motleyrice.com
Jones, Bruce Gregory: bjones@faegre.com, dybarra@faegre.com

Jones, Tim: Tim_Jones@tyson.com
Jorgensen, Jay T.: jjorgensen@sidley.com, lsenior@sidley.com
Kleibacker Lee, Krisann C.: kklee@faegre.com
Lennart, Joseph P.: jlennart@riggsabney.com
Longwell, Nicole Marie: Nlongwell@mhla-law.com, Lvictor@mhla-law.com, jwaller@mhla-law.com
McDaniel, Archer Scott: smcdaniel@mhla-law.com
Moll, Ingrid L.: imoll@motleyrice.com, ajanelle@motleyrice.com, vlepine@motleyrice.com
Nance, Robert A.: rnance@riggsabney.com, jzielinski@riggsabney.com
Narwold, William H.: bnarwold@motleyrice.com
Orent, Jonathan D.: jorent@motleyrice.com
Owens, George W.: gwo@owenslawfirmpc.com
Page, David Phillip: dpage@riggsabney.com
Redemann, Robert Paul: rredemann@pmrlaw.net, cwatson@pmrlaw.net, kcharters@pmrlaw.net
Riggs, Melvin David: driggs@riggsabney.com
Rose, Randall E.: rer@owenslawfirmpc.com
Rousseau, Michael G.: mrousseau@motleyrice.com
Ryan, Patrick M.: pryan@ryanwhaley.com, jmickle@ryanwhaley.com, amcpherson@ryanwhaley.com
Sanders, Robert: rsanders@youngwilliams.com
Todd, Gordon D.: gtodd@sidley.com
Tucker, John H.: jtucker@rhodesokla.com
Tucker, KC Dupps: kctucker@bassettlawfirm.com
Weaver, Sharon K.: sweaver@riggsabney.com
Weeks, Gary Vincent: gweeks@bassettlawfirm.com
Williams, Edwin Stephen: steve.williams@youngwilliams.com
Wisley, P. Joshua: jwisley@cwlaw.com
Xidis, Elizabeth Claire: cxidis@motleyrice.com

/s/ Ingrid L. Moll

Ingrid L. Moll
MOTLEY RICE LLC
One Corporate Center
20 Church Street, 17th Floor
Hartford, CT 06103
(860) 882-1678
imoll@motleyrice.com